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No. 87-1849

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GALLOWAY FARMS, INC.,
Petitioner,

vs.

PHOENIX MUTUAL LIFE INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

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STATEMENT OF THE CASE

Phoenix Mutual Life Insurance Company[1] (Respondent) is the holder of a Promissory Note and Mortgage from Galloway Farms, Inc. (Petitioner) encumbering certain farm real estate situated in Ringgold County, Iowa. Respondent on February

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[1] Pursuant to Rule 28.1, Rules of the Supreme Court of the United States, the Court is advised that Respondent is a corporation with the following parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates: (a) Parent Companies - None; (b) Subsidiaries (except wholly owned subsidiaries) - Phoenix Re Corporation; American Brokerage Excess, Inc.; KWL of CT, Inc.; Erickson Swan-Rowley of Jamestown, Inc.; and B.C.A. Corp.; (c) Affiliates - Commercial Development Fund '85; Phoenix Murray Realty Investors, LTD.; Treetops Apartments Limited Partnership; Phoenix Farmland Investors Partnership-I; and Participating Development Fund 86.

25, 1983 commenced in the Iowa District Court for Ringgold County a mortgage foreclosure action against Petitioner, the owner of the mortgaged real estate, and against certain other defendants who hold lien interests in the real estate.[2]

On February 4, 1985, Respondent filed its Motion for Summary Judgment. The Iowa District Court scheduled that Motion for oral hearing to be held on March 5, 1985. On March 4, 1985, Petitioner filed its resistance to the Summary Judgment Motion with the Iowa District Court. Also on that date it filed with the Clerk of the Iowa District Court its "Notice of Filing Petition for Removal of Civil Action" with attached "Petition for Removal of Civil Action" stating that a Petition for Removal had been filed with the United States District Court for the Southern District of Iowa on March 4, 1985. On March 5, 1985, the Iowa District Court proceeded with the scheduled oral hearing on Respondent's Motion for Summary Judgment and at the conclusion of the hearing ruled that the Motion for Summary Judgment was granted.

Although the "Notice of Filing Petition for Removal of Civil Action" filed by Petitioner on March 4, 1985 in the Iowa District Court states that a Petition for Removal of the action was filed with the office of the Clerk of the United States District Court for the Southern District of Iowa on March 4, 1985, reference to the records of the Clerk of that Court reveals something substantially different. In fact, the docket sheet of the Clerk of the United States District Court reveals that Petitioner filed a "Motion to File Petition to Remove and Proceed

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[2] Petitioner incorrectly indicates that the case caption herein contains the names of all parties to this proceeding. In fact there are additional parties identified as: United States of America, for and on behalf of its agent, the Small Business Administration; Frank Hough; Commodity Credit Corporation; and Ringgold County, Iowa. All of such additional parties were named as defendants in the foreclosure action commenced by Respondent because they are the holders of additional liens against the subject real estate.

as a "Poor Person" with an attached "Affidavit of Impecuniosity" on March 4, 1985. On March 8, 1985, the presiding United States District Court Judge signed an Order allowing Petitioner to proceed without the prepayment of costs or fees or necessity of giving security therefor. The Order was filed with the Clerk of the United States District Court on March 11, 1985. On March 11, 1985, Petitioner's Petition for Removal of Civil Action was filed with the Clerk of the United States District Court without the requirement of first paying the filing fee or posting a removal bond. (Thereafter, as a consequence of a Motion to Remand filed by Respondent, the action was remanded to state court.)

On March 8, 1985, Galloway filed its Appeal with the Iowa Supreme Court appealing from the Iowa District Court's March 5, 1985, grant of Respondent's Motion for Summary Judgment. The Iowa Supreme Court thereafter affirmed the Iowa District Court's granting of Respondent's Motion for Summary Judgment in an opinion reported as *Phoenix Mutual Insurance Company, Inc. (sic) vs. Galloway Farms, Inc.*, 415 N.W.2d 640 (Iowa 1987). The Iowa Supreme Court decided, *inter alia,* that Petitioner did not affect a removal to the United States District Court by filing its "Motion to File Petition to Remove and Proceed as a Poor Person". Removal was not affected until the *in forma pauperis* motion was granted by the United States District Court Judge and the Petition for Removal was filed by the Clerk of the United States District Court. Since Respondent's Motion for Summary Judgment was heard after the filing of the *in forma pauperis* motion, but prior to the granting of the same and the filing of the Petition for Removal, the summary judgment hearing before the Iowa District Court was proper.

ARGUMENT

I

Petitioner's Petition For Writ Of Certiorari Is Untimely And Should Be Dismissed

Copies of correspondence directed to the Clerk of the United States Supreme Court received by Respondent's attorney from Petitioner's attorney indicate that Petitioner originally submitted its Petition for Writ of Certiorari by mailing the same on February 17, 1988, with the Clerk of this Court receiving the same on February 22, 1988. That original filing was made *in forma pauperis* under Rule 46, Rules of the Supreme Court of the United States. Since Petitioner is a corporate entity, rather than an individual, the *in forma pauperis* filing was rejected by the Clerk of this Court and returned to Petitioner's attorney. Thereafter, under cover letter from Petitioner's attorney dated May 2, 1988, and received by the Clerk of this Court on May 7, 1988, the Petitioner's printed Petition for Writ of Certiorari, together with Petitioner's $200.00 filing fee, was submitted to this Court. The office of the Clerk of this Court has advised Respondent's attorney that based on the foregoing facts, the Petitioner's Petition for Writ of Certiorari is being docketed under the date of February 22, 1988.

Respondent respectfully asserts that the foregoing facts demonstrate that Petitioner's Petition for Writ of Certiorari is untimely and ought to be dismissed for lack of jurisdiction. A Petition for Writ of Certiorari shall be deemed in time when it is filed with the Clerk within the time prescribed by law. Rule 20.2, Rules of the Supreme Court of the United States. A Petition for Writ of Certiorari in a civil action must be taken or applied for within 90 days after the entry of the judgment or decree in question. 28 U.S.C. § 2101(c). A justice of the Supreme Court, for good cause shown, may extend the time for applying for a Writ of Certiorari for a period not exceeding 60 days. 28 U.S.C. § 2101(c).

In the present case, Petitioner's Petition for Writ of Certiorari was in fact not received in proper form by this Court until May 7, 1988, 164 days after the Iowa Supreme Court's November 25, 1987, decision here in issue. Even if the Court were to consider the various filings herein by Petitioner to constitute a request for a 60 day extension of time under 28 U.S.C. § 2101(c), Petitioner's filing herein is still untimely. This is the case whether Petitioner's filing is deemed made when mailed on May 2, 1988, (159 days after the Iowa Supreme Court's decision), or when filed with the Clerk of this Court on May 7, 1988, (164 days after the Iowa Supreme Court's decision).

Although Rule 33.7, Rules of the Supreme Court of the United States, provides that a filing not accepted by and returned by the Clerk of this Court for noncompliance with Rule 33 shall not be deemed untimely, the condition of the application of that Rule is that "new and proper copies are promptly substituted". In the present case nearly two and one-half months (extending from late February, 1988 through early May, 1988) expired between the Clerk's rejection of Petitioner's improper *in forma pauperis* filing and Petitioner's submission of a printed Petition for Writ of Certiorari accompanied by the $200.00 docket fee. Under the circumstances of this case, Petitioner's failure to submit proper documents until two and one-half months later should not be considered a prompt substitution, particularly when the subsequent filing was made outside the jurisdictional period of 150 days provided under 28 U.S.C. § 2101(c) upon a showing of "good cause" by Petitioner.

Petitioner's Petition for Writ of Certiorari should be dismissed as being untimely and outside the jurisdiction of this Court.

II

Petitioner Has Not Shown Sufficient Reasons To Support Review Of Its Petition For A Writ Of Certiorari

The Supreme Court's review of a decision of a state court of last resort is "not a matter or right, but of sound judicial discretion, ... granted only when there are special and important reasons therefor." Rule 17.1, Rules of the Supreme Court of the United States. It is reserved for review of a decision of a state court of last resort which conflicts with the decision of another state court of last resort or of a federal court of appeals; to settle important questions of federal law not previously decided; or to correct decisions made in conflict with applicable decisions of this Court. See generally, Rule 17.1 (b) and (c), Rules of the Supreme Court of the United States.

In the present case, Petitioner has not cited, nor is Respondent aware of, any conflict between the decision of the Iowa Supreme Court and the decision of any other state court of last resort or of a federal court of appeals. Similarly, Respondent is not aware of any conflict between the decision of the Iowa Supreme Court and any applicable decisions of this Court.

Finally, Respondent does not believe that this case involves an important question of federal law which has not been, but should be, settled by this Court. Respondent respectfully asserts that this Court has issued numerous decisions which sufficiently define the scope of the right of access to the courts by indigents under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See, for example, *Ortwein v. Schwab,* 410 U.S. 656 (1973); *United States v. Kras,* 409 U.S. 434 (1973); *Boddie v. Connecticut,* 401 U.S. 371 (1971); and *Griffin v. Illinois,* 351 U.S. 12 (1956), reh'g denied, 351 U.S. 958. The Iowa Supreme Court properly considered this Court's prior rulings on the scope of the constitutional right of access to the courts by indigents and properly concluded that Petitioner's constitutional rights were not violated.

III

The Iowa Supreme Court Properly Decided Petitioner's Appeal

Petitioner alleges that removal to United States District Court pursuant to 28 U.S.C. § 1446 was affected on March 4, 1985, thereby preventing the Iowa District Court from lawfully proceeding with the March 5, 1985 hearing on Respondent's Motion for Summary Judgment. Respondent alleges, and the Iowa Supreme Court has agreed, that Petitioner's removal to federal court was not completed until March 11, 1985. The Iowa Supreme Court rejected Petitioner's claim, based on Fourteenth Amendment due process and equal protection considerations, that the filing date of the Petition for Removal should relate back to the date when the motion to proceed *in forma pauperis* was submitted the United States District Court. *Phoenix Mutual Insurance Company, Inc. (sic) v. Galloway Farms Inc.*, 415 N.W.2d 640 (Iowa 1987).

As recited in the Statement of the Case above, Petitioner filed its "Motion to File Petition to Remove and Proceed as a Poor Person" in the United States District Court on March 4, 1985. Pursuant to local court rule, however, the Clerk of the United States District Court did not file the Petition for Removal until after the federal judge's March 8, 1985 Order allowing Petitioner to proceed without prepayment of costs or fees. Accordingly, Petitioner's Petition for Removal was not filed until March 11, 1985, six days after the summary judgment hearing and foreclosure ruling in the Iowa District Court.

The pertinent subsections of 28 U.S.C. §1446, subsections (a), (d) and (e), provide as follows:

> "(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified

petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action."

"(d) Each petition for a removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

"(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice hereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall affect the removal and the State court shall proceed no further unless and until the case is remanded."

Removal to federal court is normally affected by the filing with the federal court of a petition for removal accompanied by a removal bond, giving notice thereof to all adverse parties and filing a copy of the petition for removal with the clerk of the State court.

Also pertinent is Title 28 U.S.C. §1914(a) which provides that the Clerk of each federal district court shall require the party instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a fee of $60.00 (now $120.00). Title 28 U.S.C. §1914(c) provides that each district court by rule or standing order may require advance payment of fees. A federal district court clerk has no obligation to file a complaint that is submitted without the payment of the clerk's fees. *Turkett v. United States*, 76 F.Supp. 769 (N.D. N.Y. 1948).

Title 28 U.S.C. § 1915, entitled "Proceedings in forma pauperis", provides that the federal court may authorize the commencement of an action, without the prepayment of fees or costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. A person proceeding *in forma pauperis* under 28 U.S.C. §1915 is relieved from the 28 U.S.C. §1446(d) requirement of posting a removal bond. *Pasquarella v. Santos,* 416 F.2d 436 (C.A.1st 1969).

Local Rule 1.12 adopted by the United States District Court for the Southern District of Iowa provides as follows:

> "Unless leave to proceed in forma pauperis has been granted, the Clerk may require that a party commencing an action in this court, filing a notice of appeal, or removing one from another court to first pay the statutory fee before the case may be filed, docketed, and process issue thereon."

Pursuant to this Local Rule the federal District Court Clerk did not file Petitioner's Petition for Removal until after Petitioner's motion to proceed *in forma pauperis* was granted.

Title 28 U.S.C. Section 1446(e) requires the moving party to give written notice of the removal and to file a copy of the petition for removal with the clerk of the State court *after* the filing of the petition for removal with the United States District Court. It is only *after* the filing of the petition for removal with the United States District Court that the State court is prevented from proceeding under 28 U.S.C. Section 1446(e).

In this case, Petitioner filed a removal notice with the Clerk of the Iowa District Court on March 4, 1985, prior to its Petition for Removal being filed with the United States District Court on March 11, 1985. In that context, the Iowa District Court could not be and was not prevented from proceeding with the March 5, 1985 hearing on Respondent's Motion for Summary Judgment.

The Iowa Supreme Court appropriately rejected Petitioner's Fourteenth Amendment based due process and equal protection arguments. The Iowa Supreme Court reasoned that there is a rational justification for the local court rule which prevents filing of a removal petition until an accompanying motion to proceed *in forma pauperis* has been approved by the court. The Iowa Supreme Court concluded that Local Rule 1.12 would discourage abuses of the removal process, including the requirement to post a removal bond, resulting from the filing of frivolous motions to proceed *in forma pauperis. Phoenix Mutual Insurance Company, Inc. (sic) v. Galloway Farms, Inc.*, 415 N.W.2d 640, 643 (Iowa 1987). The Iowa Supreme Court's decision is correct and is consistent with the well established case law of this Court.

This Court has concluded that there is broad constitutionally based right of access to the courts for indigent criminal defendants. See, e.g., *Entsminger v. Iowa,* 386 U.S. 748 (1967); *Smith v. Bennett,* 365 U.S. 708 (1961); *Burns v. Ohio,* 360 U.S. 252 (1959); and *Griffin v. Illinois,* 351 U.S. 12 (1956), reh'g denied, 351 U.S. 958. This Court has also concluded, however, that there is no fundamental right of access to the court system in non-criminal proceedings. In *Boddie v. Connecticut,* 401 U.S. 371 (1971) this Court stated as follows:

> "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so the exercise may not be placed beyond the reach of any individual." 401 U.S. at 382.

In *Boddie,* this Court went on to conclude that it was a violation of due process to deny persons access to marriage dissolution proceedings because of indigency. The court reasoned the marriage is a fundamental human relationship and that the exclusive means of terminating a marriage is vested in the courts.

In other non-criminal law contexts, this Court has concluded that the existence of a rational basis may limit access to the courts by an indigent. In *United States v. Kras,* 409 U.S. 434 (1973), this court concluded that there is no right to file a bankruptcy without prepayment of the applicable bankruptcy fees. In *Ortwein v. Schwab,* 410 U.S. 656 (1973), this Court concluded that there is no right to appeal an adverse welfare decision without prepayment of fees.

In the present case there is no denial of access to the federal court by an indigent party seeking to remove a pending state court case to federal court. In fact there is a statutory procedure under 28 U.S.C. § 1915 allowing such a removal to occur *in forma pauperis.* A local court rule requirement that the application to file *in forma pauperis* be granted by the federal judge prior to the filing of a petition for removal does not constitute an unconstitutional deprivation of due process and equal rights. Following the reasoning of this court in *United States v. Kras, supra,* and in *Ortwein v. Schwab, supra,* a rational basis exists to support the requirement that the application to file *in forma pauperis* be approved by the federal court prior to the petition for removal being filed. Such a procedure prevents abuses of the removal process, including the requirement of posting a removal bond, resulting from the filing of frivolous *in forma pauperis* applications.

CONCLUSION

The Iowa Supreme Court properly decided under applicable law that Petitioner's removal of this action to federal court was not completed until Petitioner's *in forma pauperis* application was approved by the federal judge and its petition for removal was filed by the clerk of the federal court. The Iowa Supreme Court properly concluded that constitutional due process and equal protection considerations do not require that Petitioner's petition for removal relate back to the time that Petitioner filed its *in forma pauperis* motion with the federal district court. The Iowa Supreme Court's decision is not in conflict with the decisions of any other state court of last resort or of any federal circuit court of appeals. The Iowa Supreme Court's decision is consistent with the well established case law of this Court concerning the scope of the constitutional right of access by indigents to the courts. Petitioner points to no issue of overriding national or constitutional significance requiring a decision or examination by this Court. The Petition for Writ of Certiorari should be denied.

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PROOF OF SERVICE

I, Charles E. Miller, do affirm and declare that I am counsel for Phoenix Mutual Life Insurance Company, and that three (3) copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari were served on all of the parties to this appeal by mailing three (3) copies thereof to the respective parties or counsel for said parties, as follows:

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Mailing was made by depositing copies in a United States Postal Service mail box, with first class postage pre-paid in envelopes addressed to the above addressees. This Proof of Service is made in accordance with the requirements of Rule 28.3 and 28.5, Rules of the Supreme Court of the United States.

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